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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH V. ORLEANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

REX E. LEE,
Assistant Attorney General,

HARRY R. SACHSE,
Assistant to the Solicitor General,

LEONARD SCHAITMAN,
ALLEN H. SACHSEL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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This brief is filed in reply to respondents' contentions (1) that the federal government possessed and exercised the right of supervision and control of the day-to-day activities of the Warren-Trumbull Council for Economic Opportunity (the Council) and (2) that the decision below is supported by several other decisions of the lower federal courts.

1. As we pointed out in our opening brief (at 11-15), community action agencies are local entities that receive federal assistance to carry out locally chosen and locally controlled programs; they are federal grantees that, by statute, are entitled to substantial autonomy and freedom from governmental control. See, *e.g.*, 42 U.S.C. 2781(a), 2791(b), 2796, 2808(e), and 2835. By virtue of their status as grantees, their use of federal funds and conduct of activities are by nature even further removed from day-to-day federal supervision and control than the work of independent contractors with the government, whose federally assigned tasks are closely defined by contractual terms. Since the

employees of such contractors are not employees of the United States for purposes of the Federal Tort Claims Act (see *Logue* v. *United States*, 412 U.S. 521), it would seem, *a fortiori*, that the employees of federal grantees are not either.

Respondents in effect contend, however, that community action agencies such as the Council are not true grantees but rather are federal instrumentalities, subject to close day-to-day federal supervision and control.[1] This contention is incorrect as a matter of law.

Respondents' case rests upon the following assertions: that the operations of community action agencies are subject to federal regulation (Resp. Br. 31-32); that the Council was organized to receive federal funds and carry out federal programs and received funds only from the federal government (Resp. Br. 32); and that the federal government sets personnel policy for community action agencies and, in particular, removed the chairman of the Council's governing board and appointed his successor (Resp. Br. 31-32, 40). Upon examination, these assertions, to the extent accurate, fail to support respondents' claim of day-to-day federal supervision and control.

a. That the operations of community action agencies are subject to federal regulation simply reflects their status as grantees of federal funds. When providing financial assistance through grants, the federal government seeks to assure that the public monies granted will be expended in a manner that promotes the ends for which they were

[1]In so contending, respondents concede (Resp. Br. 35) that the question whether an individual is a federal employee for purposes of the Federal Tort Claims Act turns upon whether the federal government possessed the right to supervise and control that individual's daily work, *i.e.*, whether, as this Court stated in *Logue* v. *United States*, *supra*, 412 U.S. at 528, the government controlled "the detailed physical performance" of the work.

given. Detailed regulation of the purposes for which funds may be used, including limits on salaries, non-discrimination policies, descriptions of the types of property that can or cannot be purchased, and so forth, is a normal and desirable part of a federal grant program, as is the monitoring of grant projects. For example, detailed regulations govern grants to and contracts with educational institutions. See 45 C.F.R. 100a.10 to 100a.496. It is therefore not surprising that similar regulations pertain to federal assistance to community action agencies. See 45 C.F.R. Parts 1067-1070. But these regulations, which set forth rules pertaining to, *inter alia*, fiscal integrity (see Resp. Br. 10-12, 13-14), participation by employees in unlawful demonstrations (Resp. Br. 12), lobbying activities (Resp. Br. 14), and inspection of records (*ibid.*), fall far short of day-to-day governance of the detailed physical performance of the community action agency's programs and activities. Just as educational institutions do not become federal instrumentalities merely by virtue of receiving federal aid, by the same token, making federal funding of community action agencies contingent upon their compliance with federal regulations does not transmute such agencies into federal instrumentalities, or their employees into federal employees. See *Maryland* v. *United States*, 381 U.S. 41.

b. That the Council was organized to receive federal funds is irrelevant to the question at issue in this case. As we noted in our opening brief (at 19), "the simple fact that the City of Warren and the County of Trumbull desired their citizens to receive the benefit of available federal money does not suffice to turn the entity they organized into an instrumentality or agency of the United States." Nor is it relevant that the Council, although authorized to receive funds from other sources, in fact was dependent entirely upon the United States for financial support. *Maryland* v. *United States*, *supra*.

Furthermore, it does not advance understanding of the relationship between the Council and the United States to point out that the Council was organized to carry out federal programs. Congress, in furthering a federal policy, may "offer financial support to those public or private agencies that are already doing, or that propose to do, what it deems to be in the national interest and thereby help them to initiate or to expand or improve such activities." Willcox, *The Function and Nature of Grants,* 22 Admin. L. Rev. 125, 126 (1970). That is how Congress chose to proceed with regard to community action programs. That the Council proposed to carry out such programs was simply a condition on eligibility for federal assistance; it does not establish federal control of the performance of those programs.

c. Respondents' claim of "direct [federal] involvement in personnel policy" (Resp. Br. 40) apparently rests upon the federal regulations barring participation by employees of community action agencies in unlawful demonstrations (Resp. Br. 12) and requiring approval of hiring, promotion, salary, benefits, and grievance *policies* (Resp. Br. 13-14). These regulations are, however, for the most part designed to ensure that federal funds will be spent properly, for the benefit of the poor rather than of the employees, and not for unlawful purposes. They do not entail supervision of the employees' performance of their responsibilities or control of program activities.

Respondents' assertion that the federal government removed the Council's chairman and appointed his successor is legally incorrect. The federal government has no power to remove or appoint members of a community action agency's governing board. See 42 U.S.C. 2791. As the district court noted (Pet. App. B, p. 26a), the federal government's power is simply that of the purse, to grant or withhold funds:

> While the Office of Economic Opportunity has the power to cut off Federal funds if the council fails to meet federal standards, they [*sic*] have no power to cut off funds from other sources which the council is encouraged to utilize * * *.[2]

The federal government possesses the same power with respect to independent contractors whose principal source of business is the federal government. That power to grant or withhold patronage does not convert the independent contractor, or a federal grantee, into a federal instrumentality.

In short, respondents' effort to show that the federal government "exercised day-to-day control and supervision * * * of the operation of the [Council]" (Resp. Br. 8) establishes only that federal regulations and directives determined the form of organization and the general type of projects that could be funded and that the use of grant funds was prudently monitored. There is no showing, or even allegation, that federal officers suggested or required the trip on which respondent Joseph Orleans was injured or in any way approved the actions of Westlawn Neighborhood Opportunity Center in permitting him to ride in a car driven by another minor (see our opening brief, at 5-6). Lacking such day-to-day supervision and control of the detailed physical performance of the work of the Council's employees, the United States cannot be held liable for their torts.

2. The decisions of other lower federal courts relied upon by respondents (Resp. Br. 33-39) do not support the decision below.

In *Duba* v. *Schuetzle,* 303 F. 2d 570 (C.A. 8), the court of appeals held that the Secretary of Agriculture, by statute

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[2]The affidavit asserting federal removal and appointment of the Council's chairman, upon which respondents rely (Resp. Br. 15-16), reaches an erroneous legal conclusion in describing the effect of a federal threat to withhold funding.

and regulation, administers Agricultural Stabilization and Conservation Committees and that the members of local committees, who are appointed by the pertinent state committee, have no standing to object to a change in location of committee offices. In *Delgado* v. *Akins*, 236 F. Supp. 202 (D. Ariz.), the district court held that an employee of such a local committee is a federal employee for purposes of the Tort Claims Act, emphasizing the direct hierarchical control found in *Duba*. Such control is lacking here. In *United States* v. *Holcombe*, 277 F. 2d 143 (C.A. 4), the question was the United States' liability for the tort of an employee of an officers' mess at a naval base. The United States admitted that officers' messes are " 'an integral part of the Navy establishment, and, as such, are instrumentalities of the Government' " (277 F. 2d at 145), but in denying liability relied on the fact that the employee's salary was paid with earnings of the mess, not federal funds. The court, noting the government's admission and the fact that the mess apparently had contractual authority to bind the United States for its debts, held that mess employees are federal employees. No similar integral relationship or contracting power is at issue here.

Other cases relied upon by respondents involve the negligence of persons temporarily acting as federal employees. Thus in *Witt* v. *United States*, 462 F. 2d 1261 (C.A. 2), a person having custody of federal prisoners while they cleaned out the Fort Leavenworth Hunt Club stables was held to be a temporary federal employee, making the government liable for his tort. Similarly, in *Martarano* v. *United States*, 231 F. Supp. 805 (D. Nev.), the court held that a Nevada wildlife employee engaged in a federal wildlife service project was a federal employee for purposes of the Tort Claims Act. The contract with Nevada expressly provided that " 'all operations * * * shall be under the direct supervision of the [federal] Service' " (*id.* at 807) and the court found that

throughout his employment on this project the employee had been "supervised by federal officials" (*ibid.*). There is no similar provision for federal supervision of community action agencies.

The housing cases relied upon by respondents, *Schetter* v. *Housing Authority of the City of Erie*, 132 F. Supp. 149 (W.D. Pa.), *Maryland* v. *Manor Real Estate & Trust Co*, 176 F. 2d 414 (C.A. 4), and *Toth* v. *United States*, 107 F. Supp. 37 (N.D. Ohio), are equally undeterminative of the present case. Each involved a federal housing project leased for the purpose of management to a private firm. The court in each case held that the lessee-manager was in fact a federal manager and not a true lessee and that, consequently, the United States was liable for its torts. The proprietary interest of the United States and, in at least one case (*Manor Real Estate*), the independent negligence of federal officials, distinguishes those cases.

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

LEONARD SCHAITMAN,
ALLEN H. SACHSEL,
Attorneys.

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